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[illegible] Court of the United States,

[illegible] TERM, 1921.

No. [illegible] 538

LOUISA V. KIDD, as Executrix of the Will of H. B. Tolson, deceased,

Plaintiff in Error,

against

THE STATE OF ALABAMA,

Defendant in Error.

[illegible] of Francis G. Caffey and John C. Hendrickson, of Counsel for Defendant in Error.

Supreme Court of the United States,

OCTOBER TERM, 1901.

No. 403.

LOUISA V. KIDD, as Executrix of the Will of H. B. Tulane, deceased,
Plaintiff in Error,

AGAINST

THE STATE OF ALABAMA,
Defendant in Error.

Brief of Francis G. Caffey and John C. Breckinridge, of Counsel for Defendant in Error.

STATEMENT OF THE CASE.

Louisa V. Kidd is the executrix of the will of H. B. Tulane, who died a resident of Elmore County, Alabama, in October, 1897 (Record, p. 9). In 1898, the tax assessor of that county, in accordance with Section 3947 of the Code of 1896 of Alabama, assessed to plaintiff in error, as having escaped taxation for the

years 1893 to 1897 inclusive, certain shares of stock in corporations not organized under the laws of Alabama, and not having any property or doing any business in that State, and, in accordance with Section 3981 of the Code, returned the assessment to the Court of County Commissioners (pp. 2, 3, 11, 12).

The Court of County Commissioners upheld the assessment, but, on appeal to the Circuit Court of Elmore County, it was vacated (pp. 1, 2). Thereupon an appeal was sued out from the judgment of the Circuit Court to the Supreme Court of Alabama, wherein the cause was reversed *(State vs. Kidd*, 125 Ala., 413).

On a new trial in the Circuit Court defendant filed two pleas, numbered 1 and 3, in which she set up that the statutes under which these shares of stock were held liable to taxation were in violation of the 14th amendment to the Constitution of the United States (pp. 5, 6). Demurrers to these pleas were sustained (pp. 7, 8). The cause then being submitted on an agreed statement of facts, the Court charged the jury to find for the plaintiff, and declined a request of defendant to charge that there could be no recovery upon the claim for taxes on shares of foreign railroad companies (pp. 9, 10), and judgment was rendered for the plaintiff (p. 8).

On appeal to the Supreme Court of Alabama, the judgment of the lower Court was, on the 29th day of June, 1901, affirmed on the authority of the decision on the former appeal (pp. 1, 15). Thereupon a writ of error to the Supreme Court of Alabama was sued out in this Court.

Four errors of the trial Court are assigned (pp. 17-8) and insisted on in brief of counsel for plaintiff in error, (pp. 2-4)—namely, the sustaining of demurrers to the

first and third pleas, the giving of the instruction to the jury asked by plaintiff and the refusal of the instruction asked by defendant.

ARGUMENT.

FIRST POINT.

The sections of both Alabama codes attacked by plaintiff in error must be declared unconstitutional before the judgment of the Supreme Court of Alabama can be reversed.

I. The rule in Alabama is that a plea professing to do so must answer the whole complaint; if any part of the complaint is unanswered, the plea is bad.

Deshler vs. Hodges, 3 Ala., 509.
Standifer vs. White, 9 Ala., 527.
Mills vs. Stewart, 12 Ala., 90.
White vs. Yarbrough, 16 Ala., 109.
Bryan vs. Wilson, 27 Ala., 208.
Wittick vs. Traun, 27 Ala., 562.
Cox vs. Columbus, 91 Ala., 392.
Smith vs. Heineman, 118 Ala., 195.
Carter vs. Long, 125 Ala., 280.
City of Greenville vs. Greenville W. W. Co., 125 Ala., 625.
4 Mayfield's Digest (Alabama), 469, Par. 604; 470, Par. 616-8.

The grounds of demurrer to the pleas (pp. 7, 8) do not include this objection by name, but are worded so that it can be considered to have been made in the trial court. Furthermore, the Supreme Court of Ala-

bama makes every presumption to uphold the ruling of a lower court sustaining a demurrer to a bad pleading, even to the extent of presuming, where no grounds appear in the record, that proper ones were assigned.

Hodge vs. Tufts, 115 Ala., 366, 374.
Southern Railway Co. vs. Guyton, 122 Ala., 231, 239.

The complaint sought a recovery of taxes assessed partly under the Code of 1886 and partly under the Code of 1896. This has been expressly decided by the Alabama Supreme Court.

State vs. Kidd, 125 Ala., 413, 420.

The pleas profess to answer the whole complaint (p. 5). Hence, *if the tax law contained in either code is free from the constitutional objection made, the demurrers to the pleas were properly sustained.*

II. So, also, if it be considered that the charge given or the charge refused (p. 10) raised the question of the constitutionality of these statutes, *neither charge is so framed that the ruling on it was erroneous unless the tax sections of both codes are unconstitutional.*

SECOND POINT.

The tax provisions of the Code of 1886, under which the taxes for the years 1893 to 1896 were assessed, do not deprive plaintiff in error of the equal protection of the laws.

I. *The provisions of the Code of 1886 material* to be considered are as follows :

Subdivision 2 of Section 450 defines "personal property" to include stocks. Section 453, after setting out a number of classes of property, provides in subdivision 13, "that all other property, real and personal, not otherwise specified herein," shall be subject to an annual tax of sixty cents on each hundred dollars in value.

To the same tax there is also subject, by subdivision 9 of Section 453, the capital stock of all domestic corporations in Alabama, except such portions of the capital stock as is invested in property otherwise taxed, which tax is to be paid by the corporation; but when the corporation pays the taxes levied upon the shares into which its capital stock is divided, or the same is paid by the shareholders, such corporation shall only be required to pay the taxes levied on its real and personal estate, unless its investments are otherwise taxed.

Section 478 provides that "The taxable property of every corporation, not otherwise regulated as to taxation by the laws of this State," shall be returned to the tax assessor, and if the corporation pays the tax on such property, "then no tax on the shares into which the capital stock of such corporation may be divided shall be demanded or collected of the holders thereof."

There is also levied, by subdivision 11 of Section 453, a tax on the roadbed, track and other property, real and personal, of railroads.

By subdivision 8, Section 451, it is provided that "the shares of the capital stock of any company or corporation which is required to list its property for taxation in this State shall not be assessed against the shareholders of such company or corporation."

Various corporations are required to list their prop-

erty for taxation in Alabama and among them railroad companies "whose track or roadbed, or any part thereof, is in this State," as appears by Sections 494 and 509.

These are the sections of the Code which were under consideration in the Supreme Court of Alabama.

State vs. Kidd, 125 Ala., 413.

II. *The sole attack* made upon them *by plaintiff in error is that she was deprived of the equal protection of the laws*, because owners of shares in domestic corporations and in foreign corporations doing business and owning property in Alabama were not also taxed on their shares. It is not denied that if the classification for taxation was lawful, there was no discrimination within the class to which plaintiff in error belonged. (See brief for plaintiff in error, pp, 1, 4, 7).

III. In the FIRST place, *the taxation of shares in foreign corporations doing no business and owning no property in the State and the exemption of shares in domestic corporations and in foreign corporations owning property and doing business in the State would not deprive of the equal protection of the laws.*

1. *The State has the right to discriminate* in forming classes for taxation, *provided* the basis of discrimination is *reasonable* in principle.

American Sugar Refining Co. vs. Louisiana, 179 U. S., 89, 92, and cases cited pp. 94–5.

Pacific Express Co. vs. Seibert, 142 U. S., 339, 350-355, and cases cited pp. 354–5.

Williams vs. Fears, 179 U. S., 270, 275–6.

Magoun vs. Illinois T. & S. Bank, 170 U. S., 283, 293.

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Bell's Gap R. R. vs. Pennsylvania, 134 U. S., 232, 237.
Home Insurance Co. vs. New York, 134 N. Y., 594, 606, 607.

In *Tullis vs. Lake Erie & W. R. R.*, 175 U. S., 348, 353, the Court approves another decision in which "it was said that the powers of the State to distinguish, select and classify objects of legislation necessarily had a wide range of discretion; that it was sufficient to satisfy the demands of the Constitution if the classification were practical and not palpably arbitrary."

The sole inhibition under the 14th amendment, as is in effect conceded by counsel for plaintiff in error in his brief (p. 7), is that the basis shall not be "arbitrary," "oppressive" or "capricious."

Gulf, &c., Ry. vs. Ellis, 165 U. S., 150, 155, and cases cited on brief of counsel for plaintiff in error, pp. 7, 11.

2. There is no fixed test of what basis of classification is reasonable. Each case must be considered for itself (*Bell's Gap R. Co. vs. Penn.*, 134 U. S., 237). *It is within the province of the State*, as a part of its public policy, *as an inducement to investment in shares of corporations organized or doing business and owning property within the State, to give an advantage to persons holding stock in such corporations.* A discrimination in favor of such persons, and against the holders of stock in corporations owning no property and doing no business in the State, would be reasonable in principle. The "conditions" and "circumstances" of the owners of stock in the two classes of corporations are different. One owns stock repre-

senting an interest in property which may be otherwise taxed and be of benefit to the citizens of the State; the other owns property which, unless taxed directly, cannot be reached at all and is of no benefit to the State or its citizens generally.

Pacific Express Co. vs. Seibert, 142 U. S., 352, 354.

The State may, therefore, with good reason, say to shareholders, who have the entire control of the corporation, if your corporation will organize or do business or own property within my boundaries, you will not be taxed on your shares of stock; but if you do not organize and do no business and own no property here, you will be taxed on your stock owned here.

Bell's Gap R. Co., vs. Pennsylvania, 134 U. S., 237.

Barbier vs. Connolly, 113 U. S., 27, 31, 32.

3. It is easy to conceive that *if the statutes of two States relieved from taxation shares in corporations owning no property and doing no business in the State, the citizens in each State might take stock only in corporations of this character, owning property and doing business exclusively in the other.* This would encourage investments outside the State, put property in intangible form, and, at least, be inconvenient and render taxation extremely difficuly of administration; and, unless the incorporation laws of the two States happened to be of equal attractiveness, there would be a tendency to increase in one and decrease in the other the amount of tangible property subject to taxation. In order to discourage this, if for no

other reason, the State would be justified in taxing all shares of this kind at the situs of the ownership.

4. Furthermore, *a law of this kind prevents escapes from taxation.* In order to exercise the sum total of its right to tax both the shares and the corporate property, which it undoubtedly possesses, it must be held that the State has the power to tax shares of corporations owning no property and doing no business within its limits. This is not denied. For aught that appears, the corporate property of the railroad corporations here involved may not be taxed at all, and none of the stock in them be owned, in the States in which they do business and own property. If the laws of those States tax only shares of stock and such stock is taxed at the situs of its ownership, if the contention of plaintiff in error is upheld, such shares would escape altogether any burden of taxation, either direct or indirect. The usual situs of taxation is the place of ownership.

Kirtland vs. Hotchkiss, 100 U. S., 491, 498–9.

State vs. Kidd, 125 Ala., 413, 420–1.

Such a result would be contrary to the generally prevailing policy of restricting exemptions from taxation *(Sturges vs. Carter*, 114 U. S., 521–2); and the adoption of a law which renders this impossible, as does the Alabama statute, may be said, on that ground, to be founded on a reasonable basis.

5. *The contention* of counsel for plaintiff in error that value is the sole basis of taxation, and

that all classification must be so made that equal values shall be equally taxed, flies in the face of repeated decisions of this court. In *Giozza vs. Tiernan*, 148 U. S., 657, 662, Mr. Chief-Justice FULLER says: "Nor in respect of taxation was the [14th] amendment intended to compel the State to adopt an iron rule of equality; to prevent the classification of property for taxation at different rates; or to prohibit legislation in that regard, special either in the extent to which it operates or the objects sought to be obtained by it. It is enough that there is no discrimination in favor of one as against another of the same class."

Davidson vs. New Orleans, 96 U. S., 97, 105.

Bell's Gap R. R. vs. Pennsylvania, 134 U. S., 232, 237.

Pacific Express Co. vs. Seibert, 142 U. S., 339, 351.

Adams Express Co. vs. Ohio, 165 U. S., 194, 228.

Magoun vs. Illinois T. & S. Bank, 170 U. S., 283, 295.

Western Union T. Co. vs. Indiana, 165 U. S., 304, 309.

This contention forms the major premise of the entire brief of counsel for plaintiff in error (pp. 12–16, 18), and, if it is unsustained, the whole argument falls.

A tax system which has as its basis of classification of corporations for the purpose of taxation (1) the encouragement of the doing of corporate business

and owning corporate property within the State, (2) the discouragement of citizens of the State from investing exclusively in corporate enterprises carried on wholly in other States, and (3) a decrease of the liability of property to escape taxation, by offering an inducement to citizens to invest in property which is tangible in form and more easily discoverable by the tax assessor, is neither arbitrary, nor oppressive, nor capricious, but is founded upon reasons connected with the duties of citizens as taxpayers.

IV. In the SECOND place, the discrimination is reasonable, because *the effect of the statute, in operation, is to equalize the burden of taxation.*

1. While the contention of the plaintiff in error, that the State is without power to classify for taxation except on the basis of value of the property, is not well founded, it is true that *it is the general policy of the State to tax values equally* and to avoid double taxation so far as practicable.

State vs. Kidd, 125 Ala., 421.
1 Desty: Taxation, 199.

2. In accomplishing this, however, *the State looks only to its own tax laws* and regulates them by its own theory of fairness, and does not consider the laws of other States.

State vs. Kidd, 125 Ala., 413, 421, 422-3.
Bradley vs. Bauder, 36 Ohio St., 28, 36.
Dwight vs. Mayor, 12 Allen, 316, 322-3.

Bemis vs. Boston, 14 Allen, 366, 368.
Dryer vs. Osborne, 11 R. I., 321.
1 Desty: Taxation, 62–3.

3. As heretofore pointed out, *the Code of 1886 taxes directly the corporate property of domestic corporations and of foreign corporations owning property and doing business in the State*, and where stock in them is taxed, it is never more than on its excess in value above the value of the corporate property. While this tax on stock is required in some instances and authorized in others to be paid directly by the corporation, to avoid double taxation, if any part of the tax is paid by the shareholders, the corporation is to that extent relieved.

Code, Section 451 (8), 453 (8, 9), 478.

This has been declared to be the meaning of the foregoing sections.

State vs. Kidd, 125 Ala., 413, 421.
See, also, National Bank vs. Com., 9 Wall. 360–1.

The taxation on the excess in value of the capital stock above the tangible corporate property is not duplicate taxation, but a tax on the franchise.

Hamilton Co. vs. Massachusetts, 6 Wall., 632.
Cooley: Taxation, 2d Ed., 230.

4. Notwithstanding there is a clear distinction between the shares in a corporation and its capital stock, yet, for the purpose of taxation, so much are corporate property and stock identified that, in many States, it is held that *to tax a corporation*

on its property and its stockholders on their shares in the same jurisdiction is double taxation.

State vs. Kidd, 125 Ala., 422.
Gordon vs. Baltimore, 5 Gill., 231, 236.
Baltimore vs. B. & O. R. Co., 6 Gill,, 288.
American Bank vs. Mumford, 4 R. I., 478, 482–3.
Providence Inst. vs. Gardiner, 4 R. I., 484.
Cooley on Taxation, 228–9, and cases cited.
Burroughs on Taxation, Sec. 90.
See Farrington vs. Tennessee, 95 U. S., 679, 688.
Sturges vs. Carter, 114 U. S., 511, 521.

5. Hence, *in order for the State to* carry out its policy of avoiding double taxation, and at the same time *impose* as nearly as practicable *an equal burden of taxation* according to values, *it was necessary*, in Alabama, where this view is held, *to frame a statute such as the one here* under discussion. Discrimination in classification is necessary in order to insure equality (*Bell's Gap vs. Penn.*, 134 U. S., 237). If stock of foreign corporations held by citizens should bear any share in the support of the State, this statute "is the only mode in which the State can reach their shares for taxation" (*National Bank vs. Com.*, 9 Wall., 361). If the statute accomplishes this, the result, even though indirectly reached, is no more than what counsel for plaintiff in error seems so ardently to desire, viz., equality of burden; and surely it will not be denied that a classification for taxation, even though it is discriminating, which leads to this end is founded upon reasonable discrimination.

The Alabama law does not in fact unjustly discriminate between owners of stock in foreign corporations which own and those which do not own property in the State; it taxes all, by either direct or indirect method, once only, according to its value.

V. In the THIRD place, *even if* holders of stock in railroads owning property and doing business in the State were given an advantage, by exemption from taxation, over holders of stock in foreign railroads owning no property and doing no business in the State, and *the law on account of the discrimination were invalid, the defect would be in the exemption* of the first class and not in the taxation of the second. If the law were declared unconstitutional, it could only be in a proceeding to enforce, under subdivision 13 of Section 453, the collection of taxes from holders of shares of the first class of corporations. The vice would not be one of which the owner of foreign shares, which are taxed, could complain. Mr. Justice SHARPE (125 Ala., 423) makes this clear when he says that if there is anything in the suggestion of invalidity, "the infirmity lies in that part of the statute which allows the deduction, and not in that part which imposes the tax. * * * It does not follow that because a specially devised plan of taxation be inadequate or abortive that property to which it relates will escape taxation, for it may be reached and taxed under general provisions where they are adequate."

The shares in foreign corporations owning no property and doing no business in Alabama are indisputably subject to taxation there. If a discrimination has

been made, the only way to wipe it out is to hold that the part of the law exempting other persons owning property of the same class is invalid; it should not be by holding a perfectly general provision of law to be inapplicable to the plaintiff in error. This Court usually accepts the State Court's construction of a local statute. If Mr. Justice SHARPE'S construction quoted above is accepted, then plaintiff in error has suffered no injury and cannot complain that the exemption provision is invalid.

Shehane vs. Bailey, 110 Ala., 308.
Cooley: Cons. Lims., 6th Ed., 196.

THIRD POINT.

The tax provisions of the Code of 1896 under which the remaining taxes were assessed do not violate the Fourteenth Amendment.

I. *The material provisions of the Code of 1896* are as follows:

Sections 3906 (2), 3911 (12) and (14), 3964 and 3976 are substantially the same, except as to the rate of taxation, as Sections 450 (2), 453 (11) and (13), 494 and 509 of the Code of 1886. Section 478 and subdivision 8 of Section 451 of the Code of 1886 are entirely omitted. (See *Acts of Alabama* 1896-7, p. 1511; Code of 1896, Sec. 3907). And for subdivision 9 of Section 453 of the Code of 1886 there is substituted subdivision 9 of Section 3911.

By the latter it is provided that there shall be subject to taxation "every share of any corporation organized under the laws of this state, or any other state, or of the United States (other than railroad, telegraph, express and sleeping car companies, building and loan associations and banks or banking associations) to be assessed and collected in the county wherein such corporation has its chief or home office in this state, and to be assessed at its actual market value, to the person in whose name such shares stand on the books of the corporation, and not to the corporation." The subdivision then further provides that the tax assessor shall ascertain the value of all the shares of the corporation and from it deduct the value of the real and personal property of the corporation, and by dividing the residue by the whole number of shares ascertain the value of each share for taxation; that the corporation shall pay this tax for the shareholders and have a lien therefor upon any interest which the shareholders may have in the property owned by the corporation. It is further provided that the corporation shall be taxed upon its real and personal property, and that if the aggregate value of the shares does not exceed the aggregate value of the real and personal property of the corporation as assessed for taxation no tax shall be demanded on the shares.

The Alabama Court held that under this subdivision only those foreign corporations which have some property in the State are taxable.

State vs. Kidd, 125 Ala., 422.

II. Our associate counsel have fully argued the point that, under the Code of 1896, *the owners of*

shares of stock in foreign corporations owning property and doing business in Alabama are not exempted from taxation thereon. (See their brief, pp. 9–11). We shall not repeat that argument here.

Conceding the proposition to be established, then, on this ground alone, the argument of the plaintiff in error as to the taxes assessed under the Code of 1896 fails of its ground work, because the owners of shares of stock in all foreign corporations, whether or not owning property in the State, would be on the same footing.

Respectfully submitted,

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